In The

Supreme Court of the United States

October Term, 1976

No. 76-305

PROGRESSIVE ENTERPRISES, INC.,
Petitioner,

v.

NEW ENGLAND MUTUAL LIFE
INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. C. Epps
James W. Tredway, III
Christian, Barton, Epps, Brent & Chappell
1200 Mutual Building
Richmond, Virginia 23219

Counsel for Respondent

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Respondent, New England Mutual Life Insurance Company, prays that this Court deny the Petition for a Writ of Certiorari to review the opinion and judgment of the Fourth Circuit Court of Appeals of the United States rendered in these proceedings on May 12, 1976, rehearing denied on June 7, 1976.

QUESTION PRESENTED

Did the Fourth Circuit err as a matter of law, and decide an important state question in a way which is in conflict with applicable Virginia law, by holding that the two-

year time period fixed in the suicide clause of the life insurance Policy began to run from the "date of issue" of the Policy?

PROVISIONS INVOLVED

1. Virginia Code Ann. § 38.1-437.

In any action, motion or other proceeding on a policy of life insurance . . . to recover for the death of such person, it shall be no defense that the insured committed suicide, or was put to death by execution under the law; provided, however, that if there shall be an express provision in the body of the policy limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act (whether sane or insane), such provision shall be valid but the insurer shall be obligated to return or pay, at the least, the amount of the premiums paid on account of the policy.

2. Suicide clause contained in the Policy.

If the Insured, whether sane or insane, shall commit suicide within two years from the date of issue of this Policy, the liability of the Company under this Policy shall be limited to the payment in one sum of the amount of premiums paid, less any indebtedness to the Company.

3. Conditional receipt.

A. *Underwriting Date.* The "Underwriting Date" shall be the latest of the dates in Parts I and II of the Application and the Report of the Medical Examiner.

* * *

C. *If Policy Can Be Issued as Applied For.* If the underwriting rules of the Company permit a policy to be issued for the plan of insurance, amount, additional

benefits and rate classification applied for, it shall become effective as of the Underwriting Date.

D. *If Policy Can Be Issued, But Not as Applied For.* If the underwriting rules of the Company prevent issuance of a policy exactly as applied for, but permit issuance on some basis, then the policy with the necessary changes (called the issuable policy) shall become effective as of the Underwriting Date, but only if (1) within 60 days after the Underwriting Date the applicant accepts any necessary amendment to the Application and pays any amount necessary to complete payment of at least one month's premium for the issuable policy and (2) at the time of such acceptance and payment the proposed insured is living and there has been no change in his insurability since the Underwriting Date. If the proposed insured dies within 60 days after the Underwriting Date, and the issuable policy has neither become effective nor been refused by the applicant, it shall be deemed to be in force subject to its terms and to the following limitation: Death benefits shall be that amount which the first premium for the policy applied for, exclusive of premium for any additional benefits not available in the issuable policy, would purchase when applied as the first premium on the issuable policy.

* * *

H. *General.* No insurance shall become effective except as provided in this Receipt. This Receipt is not valid unless the Conditional Receipt Amount has been paid in accordance with Item 28 of the Application. If any check or draft given in payment for this Receipt is not honored upon presentation, this Receipt shall be of no effect. This Receipt is not valid unless countersigned by duly-licensed agent of the Company, and no agent has the authority to modify or alter the provisions of this Receipt.

STATEMENT OF THE CASE

On April 9, 1971, Petitioner executed an application for ordinary life insurance on the life of Ralph Norris Wood, Sr. This application was solicited by Hunter R. Watson, a special agent of the defendant, for coverage in the amount of One Hundred Thousand Dollars ($100,000). On April 16, 1971, a conditional receipt payment of Three Hundred Sixty-Two and 77/100 Dollars ($362.77), representing one month's premium on the policy applied for, was paid, not by Petitioner or the insured, but by the William Dominick Insurance Agency, Respondent's general insurance agency in Richmond, Virginia. No policy was issued. The policy was to be subsequently issued either as applied for or in the form of a counteroffer to Petitioner. The conditional receipt itself was apparently not delivered to Petitioner, nor requested by it.

The conditional receipt provided, in effect, that if the policy could be issued as applied for within sixty days, April 16, 1971, would be the effective date of the policy. However, if Mr. Wood's medical condition precluded the issuance of the policy as applied for, but required instead that Respondent offer a policy at a higher premium rate, the conditional receipt provided that April 16, 1971 would be the effective date of the policy only if Petitioner accepted the Policy changes and paid the additional premium *within sixty days* of April 16, 1971.

Because of the medical condition of Mr. Wood, the policy could not be issued as applied for. The Petitioner did not accept the policy as issued, nor pay the additional premium, within sixty days of April 16, 1971. Under paragraph D of the conditional receipt, coverage under the receipt lapsed on June 16, 1971.

After coverage under the conditional receipt expired by its own terms, Respondent notified its agent and instructed him to "continue underwriting, although on a non-prepaid basis." There was no suggestion that coverage was continuing under the receipt. No refund of the conditional receipt amount was made to Petitioner or insured at this time because the agent, and not Petitioner or insured, had advanced this amount.

The Policy ultimately issued on the life of Mr. Wood, policy No. 3,465,445, was a special class Policy rated Table H. The annual premium on this Policy was Five Thousand Eight Hundred Thirty-Two and 56/100 Dollars ($5,832.56) and the monthly premium was Five Hundred Ten and 35/100 Dollars ($510.35). This Policy was approved by Respondent on July 23, 1971, and was accepted by Petitioner. On this same date, Petitioner paid the annual premium on this issuable Policy; it did not pay "an additional premium." At this same time, the money paid under the conditional receipt by the Richmond Agency was refunded to it. There was no retention of premium by Respondent.

The Policy was actually delivered to Petitioner on or about August 4, 1971. It bore a "date of issue" of May 28, 1971. This "back-dating" was done to avoid an age change by the insured and thus provide a lower annual premium.

On May 5, 1973, the insured, Ralph Norris Wood, Sr. committed suicide. Respondent refused to pay the death benefit of $100,000 because suicide occurred within two years from the "date of issue" of May 28, 1971. Pursuant to its contract obligation, Respondent tendered to Petitioner a refund of all premiums paid for the Policy, but this tender was refused.

The Petitioner instituted suit in Prince Edward County, Virginia against Respondent for $100,000. Respondent re-

moved this suit to the United States District Court for the Eastern District of Virginia, which Court entered judgment for New England Mutual Life Insurance Company. The Fourth Circuit Court of Appeals affirmed the decision of the District Court on May 12, 1976, and denied a rehearing on June 7, 1976. Neither the District Court nor the Fourth Circuit found that Respondent had misled the insured or Petitioner in any way.

REASONS FOR DENYING THE WRIT

Progressive Enterprises, Inc. states in its Petition that the Fourth Circuit's opinion in this case undermines Virginia's incontestability clause found in § 38.1-394 of the Code of Virginia. This argument is without merit. Petitioner ignores the fact that under Virginia law a suicide clause in an insurance policy is to be governed by the statute relating to suicide, rather than incontestability. *New England Mutual Life Ins. Co.* v. *Mitchell,* 118 F.2d 414 (4th Cir. 1941). Virginia's suicide statute (§ 38.1-437 of the Code of Virginia) provides than an insurance policy may contain a provision limiting the liability of the insurer to return of premiums if the insured commits suicide "within two years from the date thereof." In full compliance with this statute, the Policy contained the following suicide clause:

> If the Insured, whether sane or insane, shall commit suicide *within two years from the date of issue of this Policy,* the liability of the Company under this Policy shall be limited to the payment in one sum of the amount of premiums paid, less any indebtedness to the Company. (Emphasis supplied).

The front page of the Policy in issue clearly provided a "date of issue" of May 28, 1971. Thus, by clear, express

and unambiguous terms, the two-year period fixed in the suicide clause commenced on May 28, 1971. The suicide of Ralph Wood on May 5, 1973, occurred within two years of this date; accordingly, the liability of Respondent was limited to return of premiums.

Petitioner next argues that there was in existence a continuous and uninterrupted single policy of insurance on the life of Ralph Wood, with coverage commencing on April 16, 1971, when the conditional receipt payment was made by the agent. The conditional receipt, however, provided in paragraph D (when a policy can be issued but not as applied for) that April 16, 1971, would become the "effective" date of the policy only if within sixty (60) days of April 16, 1971, Petitioner (1) accepted the necessary changes to the Policy and (2) paid an amount necessary to complete payment of at least one month's premium for the issuable policy. Neither of these conditions was met. No conditional receipt payment beyond the original Three Hundred Sixty-Two and 77/100 Dollars ($362.77) was ever made even though one month's premium under the Table H special class Policy ultimately issued would have been Five Hundred Ten and 35/100 Dollars ($510.35). Furthermore, the changes in the Policy were not accepted by the applicant until approximately July 23, 1971, (when the annual policy premium was paid), well after the sixty day period had elapsed. Therefore, by the very clear and express terms of the conditional receipt, coverage thereunder lapsed on June 16, 1971, and April 16, 1971, did not become the "effective" date of the Policy ultimately issued. *See Bickford* v. *Metropolitan Life Ins. Co.,* 317 A.2d 573 (N.H. 1974).

Coverage under the Policy ultimately issued, accepted by Petitioner on July 23, 1971, and actually delivered on or about August 4, 1971, was separate and distinct from the

earlier coverage provided by the conditional receipt. The amount of the temporary coverage under the conditional receipt, as outlined in paragraph D of the receipt, was that amount which the first premium for the policy applied for ($362.77) would purchase when applied as the first premium ($510.35) on the issuable policy. This would have been approximately $70,000. Of course, under the Policy ultimately issued by respondent, the amount of coverage was $100,000. This is as clear an indication as any that two separate insurance contracts existed at different times on the life of Ralph Norris Wood, with only the latter Policy being in effect at his death. Furthermore, as indicated above, the premium was higher for the Policy than it was for the coverage under the conditional receipt.

The Policy applied for, which could not be issued because of Mr. Wood's health, also included a waiver of premium benefit. This was, however, not included on the Policy that was issued on Mr. Wood's life. Again, this demonstrates that the Policy represented a contract of insurance separate and apart from that provided in the temporary coverage under the conditional receipt. For all of these reasons, it is clear that the conditional receipt date of April 16, 1971, was not the "effective" date of the Policy. As the Fourth Circuit concluded:

> [T]he "date of issuance," as used in the suicide exclusion provision, must be assumed to be either the actual date of issue of the policy [July 23, 1971] or its formal date [May 28, 1971]. In either event, the plaintiff would be barred from recovery by the suicide exclusion provision. (App. 6).

Lastly, Petitioner argues that it should have prevailed because Respondent failed to return the conditional receipt premium and instructed its agent that it was continuing to

cover. New England Mutual, however, merely instructed its agent to continue the *underwriting* process; it never told its agent, or anyone, that coverage under the conditional receipt would continue beyond June 16, 1971. No refund of the conditional receipt premium was made to Petitioner or insured because this money was not paid by them; the conditional receipt premium was paid by the agent and was refunded at the time Petitioner paid the annual policy premium to Respondent (July 23, 1971).

Nevertheless, Petitioner argues that Respondent's failure to refund immediately the conditional receipt payment to the agent estops it from asserting that April 16, 1971, was not the effective date of the policy ultimately issued. The Fourth Circuit, however, disposed of this point by reference to the case of *Hayes* v. *Durham Life Ins. Co.*, 198 Va. 670, 96 S.E.2d 109 (1957). In *Hayes,* the Virginia Supreme Court held that insurance coverage did not come into being by reason of retention of the insured's premium by the defendant insurance company. The issue in this case is quite similar: whether or not insurance coverage, which has otherwise terminated under the express terms of the conditional receipt, is deemed to be continued in force, or revived, because of retention of the premium. The holding and reasoning of *Hayes* must be controlling here in a diversity case arising under Virginia law. The Fourth Circuit recognized here, and previously in *Justice* v. *Prudential Insurance Company of America,* 351 F.2d 462 (4th Cir. 1965), that the Virginia Supreme Court itself should have the privilege of reviewing the application of *Hayes* and to consider limiting it to its facts.

> Subsequent cases may afford Virginia the opportunity to limit Hayes to its facts in view of the growing recognition of the public interest involved in requiring

insurance companies to act promptly when they hold an applicant's premium in order not to mislead him to his detriment into believing that he is covered, but such a decision in view of the very broad and sweeping dicta of the Hayes case should come from Virginia's courts. We therefore conclude with the district court that the Hayes case is controlling and fatal to the plaintiff's cause in this action. *Id.* at 463.

The Courts below decided this particular issue in conformity with Virginia law. Under this Court's Rule 19, a writ should not be granted.

CONCLUSION

The Courts below decided this case properly and in compliance with Virginia law. Accordingly, Respondent prays that this Court deny the write of certiorari.

NEW ENGLAND MUTUAL LIFE
INSURANCE COMPANY

By Counsel

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A. C. EPPS
JAMES W. TREDWAY, III
Christian, Barton, Epps, Brent & Chappell
1200 Mutual Building
Richmond, Virginia 23219

Counsel for Respondent

September 22, 1976

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, does hereby certify that on the 22d day of September, 1976, I mailed, postage prepaid, three copies of Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to the following counsel of record for Petitioner.

E. D. David, Esquire
Jones, Blechman, Woltz & Kelly
2600 Washington Avenue, Suite 700
Newport News, Virginia 23607

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A. C. EPPS